FROM JOHN AUSTIN TO JOHN C. HURD.

A FEW WORDS ON THE NATURE AND LIMITATIONS OF POLITICAL SOVEREIGNTY — ESPECIALLY WITH REFERENCE TO THE UNITED STATES.

BETWEEN the lives of John Austin and John C. Hurd — whose associated names give the heading to this paper — there is a certain interesting parallelism. Hurd, the American, like Austin, the Englishman, was educated for the bar, possessed high legal attainments, but was never able sufficiently to master his peculiarities of temperament to practise his profession. He was graduated from Yale in 1836, passed his early manhood in study and travel, and in 1858 published his first book, The Law of Freedom and Bondage — a juristical treatise suggested by the existence of slavery in the United States. The book met with appreciation from scholars, but won no favor with the general public; and it was not until 1878, twenty years later, and while Mr. Hurd was absent in Japan, that Yale College, awakening to the genius of her author-graduate, conferred upon him the degree of Doctor of Laws. In 1881 Mr. Hurd published his second book, the most important of his life, entitled The Theory of our National Existence. This work, like its predecessor, was accorded no general recognition, and in so far as recognized at all was misunderstood. In sheer desperation at his ill luck in making himself intelligible, Mr. Hurd in 1888 printed anonymously a little volume entitled The Century of a Revolution, in which he sought in rough and ready phrase to gain at least the ear of American readers. His final word was uttered in a scholarly and temperate pamphlet, The Union State, printed in 1890, just two years before his death.

As a result of the reading of The Theory of Our National Existence, a copy of which I chanced one day to pick up in the library of the Iowa State University, I wrote to Mr. Hurd, and soon received a reply in which he said: "It is most gratifying to me to learn that I have one more reader for The Theory. I should perhaps say one reader who will speak of reading it 'with much intellectual stimulus and pleasure.' As to your main inquiry, 'to what extent Mr. Hurd's views have gained acceptance in this

country,' I can say most decidedly that the views which I intended to set forth have not, so far as I know, been accepted by any one." Having occasion to go East in 1889, I sought out Mr. Hurd. I found him living quietly in Boston, a stately gray-haired man, of the fine old school of manners in which Austin himself had been bred, kind-hearted and surrounded by well beloved books. He was careful to give no outward sign, but I suspect that there were hours when he felt that he was intellectually out of touch with his generation — that he, like Austin, had been born, so to speak, "out of time and place."

But the parallelism between Austin and Hurd, with which it is proposed here to concern ourselves, is one of ideas and not of personal history. Both men dealt with the subject of political sovereignty, its nature and limitations. They dealt with the subject, moreover, from the same point of view and in the light of principles which they equally accepted: the former proceeding deductively and applying the results of his thinking to political societies in general; and the latter, rather by inductive processes, applying the results to the solution of the question, Where is the seat of political sovereignty in the United States of America? Austin in his lecture VI., delivered prior to 1832 and entitled by one of his editors Independent Society, had suggested a particular solution; and Hurd, writing in 1881, seized upon this and developed it into a complete and consistent explanation of the many points regarding the nature of our federal system which vexed, harassed, and fairly overwhelmed our statesmen, courts, and publicists during the period of the Civil War and Reconstruction.[1]

The views held by Austin concerning political sovereignty, and the relation of the latter to positive law, are set forth by him in a series of terse, pregnant propositions constituting, when taken together, a single comprehensive definition which, although so worn by use as to be threadbare, it will nevertheless be desirable to repeat: —

(1) "If a determinate human superior," says Austin, "not in a habit of obedience to a like superior, receive habitual obedience from the bulk of a given society, that determinate superior is sov-

[1] In 1864 Mr. Orestes A. Brownson published a series of articles in his Quarterly Review, setting forth ideas substantially identical with those of Mr. Hurd. As Mr. Brownson frankly states, however, these ideas were derived from Mr. Hurd's first book, The Law of Freedom and Bondage, in which (at chapter xi.) the author anticipates the conclusions presented in detail in The Theory of Our National Existence. Mr. Brownson's articles were afterwards gathered into a volume entitled The American Republic, and this work is much quoted and referred to by Mr. Hurd.

ereign in that society, and the society — including the superior — is a society political and independent." And again : —

(2) "Every positive law is set directly or circuitously by a monarch, or sovereign number, to a person or persons in a state of subjection to its author." And lastly : —

(3) "The power of a monarch properly so called, or the power of a sovereign number, in its collegiate and sovereign capacity, is incapable of legal limitation."

"But what of it all, anyway?" somebody may ask. "Suppose Austin's definition to be substantially correct, is not the whole dispute one more about words than things — one far more academical and scholastic than practical? 'The general fabric of rights in any society,' Professor T. H. Green, says, 'does not depend on the existence of a definite and ascertained sovereignty, . . . on the determination of a person or persons in whom supreme power resides;' hence what essential or even important difference does it make to anybody whether political sovereignty be — as is maintained by Professor D. G. Ritchie and Mr. W. S. M'Kechnie — in the General Will, or — as is maintained by Professors Henry Sidgwick and A. V. Dicey — in determinate persons ; whether — as is maintained by Mr. W. W. Willoughby and the former — sovereignty be a unit, or — as is maintained by Mr. A. Lawrence Lowell and the latter — it be divisible into parts?" The answering of this question brings us directly to the United States of America and to Mr. John C. Hurd; for the determination of the location and nature of the political sovereign in a federal community like the United States, as undertaken by Mr. Hurd, affords one of the best and most interesting tests of the value in political science of the abstract definition by Austin. That is to say, it affords one of the best tests of the value of Austin's definition in settling such questions as the following: Are the states in the American Union mere administrative departments of the federal government? and if not, how can they be discriminated therefrom? Has it from the first been permissible for a state of the Union to abjure its political existence? if so, when the Southern States attempted to secede in 1861, did they not merely abjure their statehood, thus becoming dependencies or territories? Can treason be committed against the United States by individuals who are citizens of states attempting to secede from the Union, if we hold to the doctrine of an indestructible union of indestructible states? Has the progress of time and events changed the fundamental character of the American Union? if so, was the change

effected at the time of the adoption of the federal Constitution, or was it only effected at the close, and as a result, of the Civil War? If the original union of the states remains as yet practically unchanged, what acts on the part of the federal government would indicate any drift of purpose toward procuring a change therein? What is the true position of the Supreme Court of the United States in the American Union, — is it in any sense a political arbiter for the Union? When a political party, such as the Democratic party in the United States, declares for the preservation of the rights of the states, what clear ideas as to such rights ought it to be possible to enunciate?

Austin, lecturing prior to the year 1832, and himself applying to the United States the various requirements of his abstract definition of political sovereignty, — namely, (1) that the sovereign must be a political superior not in the habit of habitual obedience to a like superior; (2) that he, or it, must be some determinate person or persons; and (3) that he, or it, must be incapable of legal limitation, — discovers the political sovereign in the United States to be the states taken collectively. To the states taken collectively — the states in union — each individual state is subject. In other words, according to Austin, the American political sovereign is an oligarchical body, but the members of this body are states instead of individuals. The states, as purely political organizations, however, consist in their respective electorates. Consequently, when the political sovereign is spoken of as an oligarchy of states, what precisely is meant is that the sovereign is the electorates of the various states acting together.[1] In commenting upon the passages from Austin which are summarized in the foregoing statement, Professor T. H. Green says that "it required all Austin's subtilty to detect where sovereignty lay in the United States, and that he places it where no ordinary citizen of the country has ever thought of it as residing."

There is truth in Professor Green's intimation that but few Americans have ever conceived of the political sovereign here as consisting in the states in union, the collective states, but foremost among those who have thus conceived of the sovereign stands Mr. Hurd. Indeed, it is by no means improbable that the latter had worked out this conception independently of Austin. At all events, as already stated, Mr. Hurd seized upon the conception, and by the matchless skill of his application of it in detail,

[1] Province of Jurisprudence Determined (Campbell's ed. 1875), p. 147.

made it peculiarly his own. To begin with, Mr. Hurd points out that it is the necessity for finding in the United States a political superior which is determinate in some particular persons, that makes it clear that the states collectively are the sovereign; for the only persons invested with ultimate political power that have ever existed in the American Union — whether before the adoption of the federal Constitution or afterwards — are the electoral bodies in the various states acting in union. Thus it is absolutely indisputable as a matter of fact — and so recognized to be by publicists of the views of Kent and Story as well as by those of the views of Jefferson and Calhoun — that no law has ever been enacted or act passed within the limits of the United States excepting by delegates or representatives chosen by the electoral bodies in the several states voting separately and according to their own state laws determining the individual voters.[1] And it is equally clear, Mr. Hurd explains, although not so undisputed, that the states have never in the whole course of their history taken sovereign action of any sort save collectively — save in union.[2] It matters

[1] "No doubt can emerge as to who the people of each colony were, any more than now as to who the people of each state are. They originally were, and still are, the body of voters or electors composing each state, the only body from which in our system any authority of a public or political nature was ever derived. Nothing is more fundamental, or of greater importance, in our system, than a clear understanding of the simple facts that the sovereign, supreme, and uncontrollable authority always resides in the body of voters or electors composing the political state, . . . and that there always were as many . . . bodies of electors as there were states in the Union. These electors are in fact the absolute sovereigns; there is no restriction of their power but their Constitution, and this they change at their pleasure." . . . "Those who attempt to maintain that the people of the United States have a history, as composing one political body, ought to show us an instance of an election at which some one elector, at least, voted under and by virtue of the law of that political body." William O. Bateman, Political and Constitutional Law of the United States (1876), pp. 33–4.

It is most extraordinary that Kent, Story, and Webster could insist that facts such as those recited by Mr. Bateman did not negative their contention that the American people existed as one political body. Such insistence is only explicable on the supposition that it was hoped thereby to overthrow the doctrine of state sovereignty, and that it was not deemed possible to overthrow this doctrine otherwise. Whether Mr. Hurd's view, had it been formulated at this period, would have been conceded by Kent, Story, and Webster to furnish a better weapon for the overthrow of "state sovereignty" is an interesting question.

[2] "There was no period when England or France, for instance, could have opened negotiations with any one of the thirteen states, as with one of the recognized nations of the world. There was but one new nation added to the family of nations as the result of the Revolutionary War." John C. Ropes, Harvard Monthly for May, 1887, p. 91.

"It is evident that the states, though declared to be sovereign and independent, were never strictly so in their individual character; but that they were always, in

not that, in the old Articles of Confederation or elsewhere, the states are declared to be severally sovereign; sovereignty is a question of fact to be settled not by what is said but by what is done, and according to this test, the states have never been sovereign otherwise than collectively or in union. Corollary to this main conclusion are two others emphasized by Mr. Hurd: first, that the general or federal government at Washington, in its three branches, legislative, executive, and judicial, being maintained in existence only by the voluntary action of the collective states in sending representatives and in choosing presidential electors, may at any time be caused to go out of existence through refusal, on the part of the states acting in union, to keep up its personnel;[1] such a course being one purely political in character, and uncontrolled and uncontrollable against the will of the collective states as sovereign, by the general government as agent; second, that any single state may abjure its political existence — its existence as one of the oligarchy of states constituting the Union — by refusal or failure to choose representatives and presidential electors, and thus pass into the condition of a dependency or territory ruled by the collective states — the states remaining in union;[2] just as a natural person, member of a sovereign corporation, may withdraw from membership therein, and pass into the condition of a mere subject.

Now it is perhaps to be wondered at that a view concerning the location and general nature of the political sovereign in the United States so exceedingly simple as the foregoing, and so much in accordance with what, upon *a priori* grounds, one might expect to be the truth about a federal Union or composite state, should up to the present time have enlisted the approval of so few thoughtful Americans. The main difficulty has arisen, I think, from the circumstances surrounding the birth of the Republic. In 1776, and before, France was permeated with Rousseau's idea of government by the consent of the governed. At the same time

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respect to the higher powers of sovereignty, subject to . . . control . . . and were never separately known as a member of the family of nations." Thomas M. Cooley, Constitutional Limitations (3d ed. 1874), pp. 6, 7.

"The thirteen colonies did not, as thirteen separate and mutually independent commonwealths, enter into a compact to sever bonds which connected them with the mother country." "They (the states) did not possess the peculiar features of sovereignty, — they could not make war, nor alliances, nor treaties." Dr. H. Von Holst, Constitutional and Political History of the United States, vol. i. (1877) pp. 6, 24 n.

[1] Theory of Our National Existence (1881), pp. 393-4.

[2] Theory of Our National Existence (1881), p. 133 n. (Brownson) and pp. 151-2.

America was writhing under the tyranny of a single monarch and despot, George III. The result was the creation throughout the land of an implacable animosity toward anything and everything in the form of a determinate person, or of determinate persons, holding the powers of sovereignty, and this sentiment has maintained itself with exceeding vigor down to the present. An illustration of this sentiment, as it existed at the close of the last century, may be found in the language of Judges Jay and Wilson, of the United States Supreme Court, in the case of Chisholm *v.* Georgia. "At the revolution," says Judge Jay, "the sovereignty devolved on the people, and they are truly the sovereigns of the country; but they are sovereigns without subjects (unless the African slaves among us may be so called), and have none to govern but themselves." And Judge Wilson says: "Under the Constitution there are citizens, but no subjects." From the idea thus set forth, that, whatever might be true of European nations, the United States had "got rid of the relation of sovereign and subject, and were to be like a perpetual-motion machine going on forever, without the effort of personal will supported by force," it was but an imperceptible step to the further idea, that, in the words of Mr. Hurd, "writing fairly engrossed on parchment, tagged with a lump of seal-wax and called the Constitution, would govern in spite of their wills those by whose wills it was to continue as law." That is to say, the American people, because of their dislike of political sovereigns, having convinced themselves that there was none to which they were subject, very naturally fell into the way of regarding law as sovereign, as something which by its own inherent force — particularly as embodied in the national Constitution — bound the states individually and the states collectively. Professor Dicey and Mr. Bryce have both remarked upon the prevalence of the spirit of legalism in this country — of the disposition to discuss political ideas from the standpoint of the lawyer — and what has just been said furnishes, I think, the explanation of this spirit and disposition: it is simply the manifestation of the national conviction that law binds the lawgiver — that, in the extreme sense maintained by the most destructive members of the destructive branch of Austinian critics the sovereign is subject to legal limitation.

That Mr. Hurd failed, during his life, even to modify in any very perceptible degree this national conviction, is not surprising. Indeed it would have been surprising had he not failed, for the conviction that the sovereign, like anybody else, is strictly amenable

to rules of positive law, and hence, as sovereign, virtually non-existent, is, with us — as has already been seen — quite as much prejudice as it is conviction, and therefore deeply rooted. But, for all that, convictions, even though they be prejudices, and even though they be prejudices of national proportions, should not be wholly beyond the reach of intellectual influences such as those of which Mr. Hurd was the author.

Let us accordingly proceed to note the leading views concerning the nature of the American Union which have been promulgated, and see how well or ill they meet the test of recognized historical facts, in comparison with the views of Mr. Hurd. The view which we shall consider first is that which was maintained by the state sovereignty or separatist party — a party having many adherents in Virginia, but whose most conspicuous members were the South Carolinians headed by John C. Calhoun. The state sovereignty view is based upon three propositions: (1) that the states were, as a matter of fact, at one time separately sovereign; (2) that sovereignty cannot be transferred under the terms of any legal contract or agreement; and (3) that sovereignty cannot, from its nature, be divided into parts. The last two of these propositions are, I think, demonstrably sound. It is evident that two or more actual sovereigns — be these sovereigns states or individuals — cannot make a legal contract by which they surrender their sovereignty either to one of themselves or to any outside sovereign,[1] for a legal contract is something that exists only as there exists law for its enforcement; and if there exists law for the enforcement of a contract between sovereigns, the sovereigns are not in reality sovereigns at all, in that there is law above them. The only agreements, therefore, which are possible between sovereigns are such as are dependent for enforcement upon purely moral considerations — such, that is to say, as are enforceable only with the consent of all the parties to them, and this is just what the state sovereignty advocates have always maintained. It

[1] It is evident that sovereignty cannot be transferred by any binding agreement. What makes a transfer of sovereignty binding is simply the possession, on the part of the transferee, of power and force sufficient to prevent the transferor from regaining it. See, upon this point, Willoughby's The Nature of the State (1896), p. 229, Dicey's Law of the Constitution (5th ed. 1897), pp. 65 n., 66 n., and The Nature of the Federal State, by E. V. Robinson, in Annals of the American Academy, May, 1894. Speaking of the accession of Texas to the Union, Mr. Hurd says: "Texas accepted a place in that single possession of sovereignty (by the states in union), and so necessarily abandoned all other sovereignty, accepting autonomy as a state while acquiring sovereignty as a member of the union state, and only as such."

is equally evident, I think, that sovereignty is a unit and indivisible. The subject, however, will be referred to again a little further along. But as to the first proposition laid down in support of the state sovereignty view, namely, that the states were at one time separately sovereign, I cannot but feel convinced that it finds no justification in history, and that Mr. Hurd has done excellent service for clear thinking in his emphatic denial of it. The declaration in the old Articles of Confederation, which preceded the federal Constitution, that each state retains its sovereignty, freedom, and independence, is doubtless — as already pointed out — the circumstance chiefly relied upon as proof that the states were at one time separately sovereign. But in relying upon words to prove the whereabouts of political sovereignty, the advocates of separatism forget that sovereignty is purely a question of fact — a political not a legal question. And in the light of facts the states have never been sovereign otherwise than collectively or in union. In other words, the states gained their independence from Great Britain not individually but in union; they were able to maintain such independence not individually but in union;[1] their local governments and institutions, therefore, no less than the general or federal government and institutions, depended for existence upon, and solely upon, the states collectively, the states in union. The states, either individually or otherwise, might adopt articles without number loudly proclaiming their separate sovereignty, but so long as they did nothing habitually to indicate separate sovereignty, took habitually no sovereign steps (sent no ambassadors, made neither war nor peace), they were no more individually sovereign than would be some natural person, member of a sovereign corporation, who, all the time that he was habitually obeying the mandates of the corporation, went about excitedly telling his friends that, although appearances were against him, he was sovereign and not the corporation, and that, if he only would, he could teach the corporation its place.

But, say the advocates of state sovereignty, the states of Rhode Island and North Carolina certainly did more than protest their separate sovereignty, for the former took no part in the convention which discussed and adopted the federal Constitution, and both, by refusing ratification of it for a year, remained for that period entirely out of the Union. Now what these two states in fact did, upon Mr. Hurd's interpretation of history, is this: first,

[1] Hurd's Union State (1890), pp. 48-9.

as members of the oligarchy of communities constituting the American Union, they fought for and helped to gain independence for the Union and autonomy for themselves; second, one of them abstained from taking part in a great convention which was participated in by the other members of the oligarchy, and both held aloof from Congress; hence their conduct at least approximated that of states which, by refusing or neglecting to be represented in the national conferences, abjure their political existence, and and are governed by the states — the states remaining in union.[1] The very continuance of local government in these two states, during the year of their so-called isolation, proves that they were in the Union as dependencies, if not otherwise; for it was only under the ægis and protection of the Union that even local government, as against possible foreign interference, could be maintained within their borders. To make use again of the illustration of the natural person, member of an oligarchy or sovereign corporation, Rhode Island and North Carolina were during their year of isolation, so-called, in an attitude of the "sulks' toward their associates. They could not be said to be habitually disobedient to their political superior; they were too feeble to be, — perhaps did not even wish to be. But they did not enjoy the society of that superior, and so availed themselves of the privilege of members of any corporation and remained for a time away from the council board. The council however, meanwhile, possessed full power over them, and, while extending with one hand the olive branch, did not disguise the fact that the other hand held the sword.

The second view of a leading character concerning the nature of the American Union, which we shall consider in comparison with the view of Mr. Hurd, is that which, before the Civil War, commanded the assent of such men as Hamilton, Story, and Webster; during the Civil War, of such men as Chase, Sumner, and Lincoln; and since the war, of such men as Garfield, Blaine, Judge Cooley, Justice Miller, and a host of others. The political parties which have successively maintained this view have been the Federalist, the Whig, and the Republican, and the view itself may not inaptly be called the Nationalist or Consolidationist view. Its principal tenets are: (1) that political sovereignty resides in the whole people of the country — the people *en masse*, the unorganized people;[2] (2) that the federal Constitution was ordained and

[1] Hurd's Union State (1890), pp. 100-1, 102-3.

[2] For a recent exposition of this view, see National Sovereignty, by John A. Jameson, in the Political Science Quarterly for June, 1890.

established by the whole people, and that this instrument created the federal government and re-created the states, endowing both with certain powers of sovereignty, which are in consequence held subject to the Constitution as law. But there are different branches of those who maintain the consolidationist view. There are those — as, for example, Professor John N. Pomeroy, Judge Thomas M. Cooley, and Dr. H. Von Holst — who contend that the several states never were sovereign; that they were always in subjection to the whole people of the country. Then there are those who contend that, while the whole people were originally sovereign through the Continental Congress, their agent, the several states afterwards usurped the powers of the people and were only ousted from such usurpation by a second usurpation, namely, one conducted by the convention which draughted and submitted the federal Constitution. Among the advocates of the usurpation idea may be mentioned Professor John W. Burgess, Professor Edward P. Smith, and Mr. W. W. Willoughby.[1] Another branch of the consolidationists is one which places much stress upon the doctrine that sovereignty is divisible, and that in the United States sovereign powers are exercised both by the federal government and by the states. Perhaps the two most prominent American writers who maintain the divisibility of sovereignty are Mr. George T. Curtis, author of The History of the Constitution, and Mr. A. Lawrence Lowell. The same doctrine, moreover, has frequently been urged by judges of the United States Supreme Court, from Salmon P. Chase to Samuel F. Miller. But what these advocates mean by "sovereignty" is sovereignty under law, sovereignty under the Constitution, the sort of sovereignty that, when in dispute between a state and the federal government, is adjudged by the latter both for itself and for the state. But in the political sense — in the Austinian sense — this is not sovereignty at all. As Mr. Hurd truly says: "The powers held by the states cannot be sovereign in any sense when the use made of them by the state governments is subject to the judgment of any department of another [the federal] government holding the other powers of sovereignty." [2]

[1] The American Commonwealth, by John W. Burgess, in the Political Science Quarterly (1886), vol. i. pp. 21–2.

The Movement towards a Second Constitutional Convention, by Edward P. Smith (1889), p. 48. (Professor Smith is of Johns Hopkins University.)

The Nature of the State (1896), pp. 267–8.

[2] Mr. Willoughby takes a like position. The Nature of the State (1896), p. 197.

Mr. Bateman also remarks: "If once the sovereign cedes his right to determine who the sovereign rightfully is, he can thence no longer be sovereign." Political

Before saying more, however, upon the question of a divided sovereignty in the United States, it will be well to take up for purposes of comparison with Mr. Hurd's view the points involved in the two main tenets of the consolidationists: (1) that the political sovereign in this country is the whole people; and (2) that the federal Constitution created the federal government and re-created the states. In no country, I think, can the mere people, the people *en masse*, be called politically sovereign, for the reason that, as has been stated by Professor Sidgwick, power to be political — that is, to exist in contradistinction to social power or mob power — must be consciously possessed, and hence must be the outgrowth of the habit of concerted action. This is only to put more explicitly what Austin meant when he said that political power must be determinate in a particular person, or in particular persons; for the people at large, the "whole people," as distinguished from particular persons, are utterly incapable of concerted action, and hence of exercising political power. It is a circumstance significantly in favor of this conclusion that it is mostly in those states (such, for example, as France) in which the sovereignty of the "whole people" has been most loudly proclaimed and persistently acted upon, that irresponsible governments most have flourished; for where the government, or agent, is held in check by everybody in general and nobody in particular — no specialized power-holders — it can virtually do what it pleases. It acts in the name of the "whole people," as did Marat (*ami du peuple*, alias *roi du peuple*) and the other bloodhounds of the French Revolution; and the "whole people," being without organization, without the habit of concerted action, does nothing, and can do nothing, but let "the government" have its will. Not simply "O Liberty!" but "O people!" (Madame Roland might have ejaculated), "how many crimes are committed in thy name!" But the whole argument against the consolidationist idea of the sovereignty of the people *en masse* in the United States is thus forcibly put by Mr. Hurd: "If the people, as found in the political corporations called the states, existing in union as one sovereignty, as political fact before any written constitution, do not hold the ultimate power of a nation among nations, there is (in this country) no *people* at all to hold it; because in the nature of things no people merely as inhabitants

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and Constitutional Law (1876), p. 161. Under the claim, therefore, of the right of the federal government to construe the extent of its own powers in all cases, sovereignty must be predicated of the federal government *alone*.

of a portion of earth-surface ever could consciously exercise such power or be known as a nation among nations." [1]

With regard to the second main tenet of the consolidationists, namely, that the Constitution created the federal government and re-created the states, the obvious remark to be made is that such a tenet, if accepted, compels us to regard the states as mere administrative departments of a central government. The Constitution is a mere document, and if any power created or re-created the states — that is, if the states are not, as Mr. Hurd contends, the original oligarchical power-holders that created the federal government and the Constitution, and that, in their collective political capacity, maintain both in existence — why then they are nothing but conveniences for the federal government as the only determinate or comeatable organ of that otherwise amorphous body, the "whole people." Now there are those, consolidationists though (as it would seem to me) they must be called, who do not at all relish the thought of being forced to deny political existence to the states. Professor Woodrow Wilson, of Princeton, is one of these, and so also is Professor Richard Hudson, of Ann Arbor, as shown by his article on State Autonomy in the New Englander and Yale Review for January, 1888. But, if the second main tenet of consolidationism be accepted, how can political existence in any real sense be predicated of the states? They owe everything to the people, — that is to say, to the federal government, and are dependent upon that government for everything.[2] That there is

[1] Hurd's Centennial of a Revolution (1888), p. 91.

[2] Professor Wilson's position is that the states are more than administrative districts or departments, because they are not subject to the commands of the federal government within their own peculiar sphere. The State: Elements of Historical and Practical Politics (Revised ed. 1899), pp. 468–9. But does not such a statement merely ignore the difficulty? There is frequent difference of opinion between states and the federal government as to what is the peculiar sphere of the latter; and, according to the consolidationists and Professor Wilson, such difference of opinion must always be decided by the federal government as a question arising under the Constitution as law. Now this is equivalent to reducing the states to a subordinate or departmental position; for if a state must, in all matters as to which its authority is called in question, submit to the decision of the federal government, wherein does it essentially differ from a public or private corporation, which within its sphere (and this is sometimes fixed by the state constitution) is not subject to be commanded, but which, in every case raising a question as to what that sphere is, must submit to the decision of the state? Both Mr. Willoughby (The Nature of the State, pp. 249–51) and Professor Dicey (Law of the Constitution, pp. 141–2) are against the position taken by Professor Wilson. Professor Dicey says: "Every legislative assembly [even a state constitutional convention], under a federal constitution, is merely a subordinate law-making body whose laws are of the nature of by-laws, — valid whilst

no halting-place for the states — on consolidationist principles — short of this is fully recognized by such writers as Professor Dicey and Mr. Willoughby. Another writer — Professor John W. Burgess — author of the paper published in the Political Science Quarterly for March, 1886, entitled The American Commonwealth — and whose consolidationism is the most ultra imaginable — says much the same thing. How different is the position of the states in our Union, according to Mr. Hurd! Instead of being the creature of the federal government, they are collectively its creator and maintainer. They exist as distinctive political societies or organisms in the Austinian sense, each an integer of a sovereign corporation. To use again a favorite illustration, while the states, according to the consolidationists, are merely a convenient congeries of individuals with no special rights or privileges, they are, according to Mr. Hurd, as mighty lords, coördainers in the government of an empire.

Recurring now to the consolidationist doctrine of a division of sovereignty between the federal government and the states, it will not be forgotten that we found this doctrine to be self-contradictory in that there was ascribed to the federal government — in case of any dispute between it and a state regarding the possession of some power of sovereignty — the exclusive right to adjudge the matter both for the state and for itself. Still, self-contradictory though the doctrine be, it has played an important part in our political history. In all that class of cases before the Supreme Court of the United States during the reconstruction period, of which Texas *v.* White is an illustration, the trend of judicial opinion was in support of Chief Justice Chase's dictum, that the American Union is an indestructible union of indestructible states; and in Congress, in spite of some strong, but on the

within the authority conferred upon it by the Constitution." See, also, Professor John W. Burgess, in Political Science and Constitutional Law (1890), vol. i. pp. 52, 79.

Under Mr. Hurd's view, the states are not departments of the federal government, because they have an existence that is political as creators and maintainers of that government, and that cannot be legally passed upon by it. For example, should the federal government ever attempt to construe the Constitution in such a way as to deprive the states of their right to send, or refrain from sending, representatives to Congress, or to fix the qualifications of voters within their limits, the states collectively — as many of them as were necessary in order to enforce compliance with their will — could, in their purely political capacity, and hence without any violation of law, arise and forbid such construction. If instead of so doing, the collective states were to submit to the construction supposed, this would be (in so far) a surrender of sovereignty by them, and an investiture of the federal government therewith — in other words, a step, and a long one, towards revolution.

whole blind protests, the same trend of opinion is discernible. Chase's dictum was evidently inspired by the conviction, generally entertained, that in some way the states were sovereign, as well as the Union; and that the eleven states that undertook to secede from the Union continued to exist as states, as political societies, in spite of their secession attitude. At the same time there was, in no less degree, the general belief on the part of the judges of the Supreme Court, members of Congress, and the people, that the individual citizens of these eleven recalcitrant states were personally amenable to the law of treason. It will at once be seen, however, that the two positions are contradictory. If the eleven states were in any intelligible sense sovereign, they could command the allegiance of their citizens, and this for purposes of secession as well as for any other purpose. But if the citizens of these states — as is really the fact in a multitude of instances, and constructively is so in all — became secessionists because their states so demanded, why then they had not freedom of choice, and were not legally chargeable with treason. There seems little doubt that reasoning of this sort had weight in constraining the federal legal authorities to drop the indictment against Jefferson Davis.[1] All uncertainty as to the crime of treason in cases like that of Davis, or of any leader of rebellion in the United States, is, however, completely set at rest, if we adopt Mr. Hurd's view regarding the nature and location of political sovereignty among us. That is to say, according to Mr. Hurd, sovereignty in the United States is the one and indivisible sovereignty of Austin, residing in the states collectively and operating with full vigor upon the citizens of any and every individual state which by acts of rebellion lays aside its statehood or political existence, and voluntarily becomes a mere dependency or territory. On this view, the question of state allegiance does not arise; for, whenever a state resists the authority of the sovereign corporation to which it belongs, it loses its capacity as a member of the corporation, and passes into the category of a mere subject population.

We have considered thus far two leading views concerning the nature of the American Union: the state sovereignty view, and

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[1] "The federal government at the close of the war had it in its power to set at rest the vexed question [of treason] by bringing the case against Jefferson Davis to trial. But the victors dreaded the result in their own tribunals. There was a widespread impression that a judicial investigation would end in establishing the fact that Mr. Davis and his associates were not, in any legal sense, rebels or traitors." The Atlanta (Ga.) Constitution, May 30, 1887.

that of the extreme nationalists or consolidationists. There remains one more view to be considered, which, if not leading in the sense of having many advocates, is so in intrinsic importance. This is the view that the Civil War settled the question of the nature of the American Union; in other words, that before the Civil War the location of political sovereignty here was not conclusively in the nation at large, or in the federal government as the organ of such nation,[1] and that it was only the manifestation of physical force by the federal government during the war that proved that government to be the place where political sovereignty was located. What such a view comes to practically is that the Civil War wrought a revolution in the Union; and among the advocates of the view may be mentioned Professor Christopher G. Tiedeman, of the University of Missouri,[2] and the editor of the New York Nation. The latter, writing in 1887, said: "Consider the condition of doubt in which the old Constitution [it would seem that we have a *new* Constitution now!] left a large part of the population as to the real seat of sovereignty in the United States. . . . It fell to the lot of the men of 1861 to settle once for all whether the federal government was a national government or not." And writing in 1899, the same editor says: "The Civil War settled all that" (namely, that the federal government is supreme). In the way of proofs that the Civil War wrought a revolution in the Union, a number of things are adduced: (1) the decisions of the United States Supreme Court in the cases of *Ex parte* Siebold and *Ex parte* Clarke, by which certain state election officers were held amenable to federal authority, and in which various dicta are laid down by the judges to the effect that "it is the duty of the states to elect representatives to Congress;" that "the government of the United States is no less concerned in the transaction than the state governments;" and that, indeed, "the due and fair election of these representatives is of vital importance to the United States;' (2) the growing disposition on the part of lawyers (and, as has already been intimated in this paper, lawyers in the United States, by reason of the legalism everywhere prevalent, are especially potent) to clothe the national Supreme Court with the powers of a political arbiter[3] — something wholly

[1] The Growth of American Nationality, by President F. A. Walker, in the Forum, June, 1895. Mr. Fitzjames Stephen describes the condition of the American Union before the Civil War as one of "dormant anarchy." Maine, Early History of Institutions, p. 377.

[2] The Unwritten Constitution of the United States (1890), p. 125.

[3] "The modern plan of making the political question dependent on the issues of

foreign to its duties as prescribed in the Constitution; and (3) the tendency of the Republican party — especially as manifested before the first election of Mr. Cleveland — to regard the federal government as the sovereign in the United States; and not only so, but to claim the right perpetually to determine the personnel of that government, on the ground that the opposite party, in denying it to be sovereign, have placed themselves in an attitude essentially traitorous.

It is indisputable that there is a certain force in these so-called proofs, but only, I think, as showing that there is grave danger that the Union may some day be permitted to be revolutionized, not that it has been revolutionized already. So long as the several states keep the right to fix the qualifications of voters for representatives in Congress, and to choose United States senators and presidential electors, just so long will it remain essentially true that the political sovereign in the United States is the states collectively, the states in union, and that the federal government is naught but the agent of this sovereign, created and maintained thereby. Some perception of the truth of this conclusion is shown even by our ultra-consolidationist contributor to the Political Science Quarterly for March, 1886, for he says: "In the way of the complete relegation of the states to this position [that of mere administrative departments of the federal government] stand three things: first, their control over the elections of the organs of the central government; second, the election of the members of the national senate by the commonwealth legislatures; and third, the equal representation of the commonwealths in the national senate." Where the danger to the continuance of the existing Union mainly lies — as indicated by the so-called proofs of accomplished revolution already given — is in indifference on the part of the various state electorates — indifference arising from a failure to realize the true nature of the Union — to changes which may hereafter be proposed fraught with loss to the states

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some private litigation, to be decided like any other contested matter incidental to the suit, seems illogical and unsystematic; but it does not offend by any show of authority; it takes the initiative from the court and gives it to any private citizen; it receives respect without seeming to command it." Simeon E. Baldwin, The American Law Review, vol. 23 (1889), p. 880. Upon the above Mr. Hurd remarks: "But a still more violent contradiction of the spirit of the Constitution, as a code, is given, when judicial precedents, derived from cases decided by a tribunal which by its place under the Constitution is identified with one of the parties litigant, are taken as political precedents having the sanction of the Constitution for the exercise or restraint of authority as between such parties." The Union State (1890), p. 118.

of the power to determine their own electorates. And it is out of this danger that the great opportunity and mission of the Democratic party in this country arises. For many years this party has preached the conservation of the rights of the states, but the trouble has been that, excepting when advocating state rights in the sense of state sovereignty, there has rarely been anything intelligible and specific in the claim of rights made for the states by the Democratic party. The party has always found it difficult to place the finger upon the rights which they wished to conserve; or rather, perhaps, to give any clear reason why the conserving of this or that "right" would count toward the maintenance of a union of the states different from the kind of union the Republican or consolidationist party was willing should be maintained. Under the tuition of Mr. Hurd, the Democratic party would in future, were occasion to arise, be able not only vigorously to oppose measures for the federal control of congressional elections, and all "force bills," but to oppose such measures on the true ground, namely, that they are in derogation of the real nature of the Union, as an oligarchy of states holding the federal government, by political right above law, strictly in subordination as the agent of such oligarchy.

We have now considered the last of the various points upon which it was desired to make some expression in this paper. In the course of our survey we have been impressed, first, with the parallelism existing alike between the lives and the speculations of John Austin and John C. Hurd. We have taken up once more the famous definition of political sovereignty formulated by Austin. Passing then to the United States of America, we have observed how, through the application of this definition, Mr. Hurd was able to formulate his idea of the American Union as one in which the political sovereign is the states collectively; and how this idea has, to a great extent, thus far failed of its natural effect, by reason of the national prepossession against sovereignty and subjection. But we have also observed the wonderful fruitfulness of the idea in its power to explain, consistently and intelligibly, a whole series of perplexing political problems: — as, for example, why the several states of the Union were never separately sovereign, although so asserted to be by the state sovereignty party of Calhoun; why — although the contrary is maintained by the consolidationist party of to-day — sovereignty cannot inhere in the whole people; why the states are not mere administrative departments of the federal government; why sovereignty in the Union

is not parcelled out between the federal government and the states; why an individual state is not precluded from abjuring its political existence; and why, on this account, treason against the United States in time of Civil War becomes a perfectly simple thing. Again, the power of Mr. Hurd's idea to solve difficult problems has been seen in the replies which it furnishes to such questions as these: Has there been a revolution in the nature of the American Union through and by reason of the Civil War? Has the national Supreme Court in our system, in any sense the power of a political arbiter? And, lastly, what is the true sphere and mission of political parties in the American Union, and more especially of the Democratic party?

Surely without exaggeration it may be said that the conclusions of John Austin, applied in detail to the circumstances of the United States by John C. Hurd, are a valuable heritage to the nation, destined (if not now) at some crisis in our affairs to bear fruit the more golden in that it has been so long delayed.

Irving B. Richman.

MUSCATINE, IOWA, November 19, 1900.